

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
EVELYN A. JANKOUSKY,

Plaintiff,

- against -

NORTH FORK BANCORPORATION INC.,
CAPITAL ONE, FINANCIAL CORP.,
CAPITAL ONE, NATIONAL ASSOCIATION,
and NORTH FORK BANK,

Defendants.
-----X

ECF CASE

Case No. 08 Civ. 01858 (PAC)

DECLARATION OF KAREN
CACACE IN OPPOSITION
TO DEFENDANTS' MOTION
TO DISMISS COMPLAINT

KAREN CACACE, under penalty of perjury, affirms and states as follows:

1. I am a member of Vladeck, Waldman, Elias & Engelhard, P.C., attorneys for plaintiff Evelyn Jankousky. I submit this declaration in support of plaintiff's opposition to defendants' motion to dismiss complaint.

2. Attached as Exhibit 1 is a transcript of Hearing before the Hon. Paul A. Crotty on April 14, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 13, 2008 in New York, New York.



KAREN CACACE

EXHIBIT 1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 EVELYN A. JANKOUSKY, . Case No. 08-cv-01858-PAC
4 .
5 Plaintiff, .
6 vs. . New York, New York
7 . Monday, April 14, 2008
8 .
9 NORTH FORK BANCORPORATION, .
10 INC., et al, .
11 .
12 Defendants. .
13

14 TRANSCRIPT OF HEARING
15 BEFORE THE HONORABLE PAUL A. CROTTY
16 UNITED STATES DISTRICT JUDGE

17 APPEARANCES: (On the record)

18 For the Plaintiff: Karen Cacace, Esq.
19 Maia Beth Goodell, Esq.
20 VLADECK, WALDMAN, ELIAS
21 & ENGELHARD, P.C.
22 1501 Broadway, Suite 800
23 New York, New York 10036

24 For the Defendants: Eric J. Bressler , Esq.
25 WICKHAM, BRESSLER, GORDON,
& GEASA, P.C.
275 Broad Hollow Road, Suite 111
Melville, New York 11747

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by Court Personnel

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produced by transcription service.

1 (Proceedings commence.)

2 THE CLERK: Your Honor, this is the matter of Evelyn
3 Jankousky v. North Fork Bancorporation, et al, Docket No. 08-
4 cv-1858.

5 Could the plaintiff please state your appearance for
6 the record?

7 MS. CACACE: Karen Cacace from Vladeck Waldman for the
8 plaintiff Evelyn Jankousky.

9 THE COURT: Ms. Cacace.

10 MS. CACACE: And Maia Goodell, sir.

11 MS. GOODELL: Maia Goodell.

12 THE COURT: Ms. Goodell.

13 For the defendant?

14 MR. BRESSLER: For the defendant, Wickham, Bressler,
15 Gordon & Geasa, Eric J. Bressler.

16 THE COURT: Okay, Mr. Bressler.

17 MR. BRESSLER: 275 Broad Hollow Road, Melville, New
18 York.

19 THE COURT: We're here on your application, Mr.
20 Bressler.

21 MR. BRESSLER: That is correct, Your Honor.

22 THE COURT: And I also have a response from Ms. -- is
23 it Cacace?

24 MS. CACACE: Yes.

25 THE COURT: Which indicates that you're wasting my

1 time because clearly Ms. Jankousky was employed by some entity
2 called North Fork, filed her EEOC complaint, you responded to
3 it, and you're suggesting generally that we've got the wrong
4 party here, right?

5 MR. BRESSLER: Yes, Your Honor.

6 THE COURT: Yeah.

7 MR. BRESSLER: And, in fact, the documentary evidence
8 supported by the -- proffered by the plaintiff in support of
9 the response I think demonstrates that.

10 THE COURT: Ms. Cacace.

11 MS. CACACE: Your Honor, as we said in our letter, we
12 filed our EEOC charge against North Fork Bank, which is where
13 Ms. Jankousky worked as a branch manager on Fifth Avenue. Her
14 W-2 form said just North Fork Bank. The respondent in the EEOC
15 proceeding represented by Mr. Bressler responded on behalf of
16 North Fork Bank, a division of Capital One NA.

17 When we -- they filed their full position statement,
18 there was some discussion about mediation. Mr. Bressler
19 represented them. After we received our right to sue notice,
20 we wanted to make sure we had the right corporate parties. We
21 did some more investigation, and it -- from the New York State
22 State Department records, we found the -- what we submitted,
23 the North Fork Bancorporation, Inc., which appeared to be doing
24 business as North Fork Bank, which was then acquired by Capital
25 One Financial Corp., so that's why we sued the parties who we

1 did.

2 If it is appropriate for us to sue Capital One NA,
3 which appears to be a subsidiary of Capital One Financial
4 Corp., we -- you know, we would request that the Court allow us
5 to amend the complaint to include that defendant.

6 THE COURT: Mr. Bressler, what exactly is the object
7 of your application? I mean, where did the plaintiff get it
8 wrong? They named the wrong party, and because the statute of
9 limitations is past, they can't cure this defect. Is that it?

10 MR. BRESSLER: Well, that is one possible result of
11 the application. However, Judge, there is more to this than
12 that.

13 THE COURT: Where did this lady work?

14 MR. BRESSLER: She worked at North Fork Bank.

15 THE COURT: Okay.

16 MR. BRESSLER: North Fork Bank then became a division
17 of Capital One NA --

18 THE COURT: Right.

19 MR. BRESSLER: -- National Association, and it's a
20 national bank. To sue a Delaware-based holding company is
21 entirely improper. It has accounting implications. There are
22 real reasons why this is not a -- not an exercise in futility,
23 Judge. Why those people were named I don't know. Having gone
24 through the administrative process, and having been issued a
25 right to sue letter, I don't know the answer to that. I don't

1 know whether --

2 THE COURT: Well, the EEOC process was done by Ms.
3 Jankousky against what entity?

4 MR. BRESSLER: North Fork Bank.

5 THE COURT: Did you object --

6 MR. BRESSLER: A state chartered banking corporation,
7 which then became a division of Capital One NA, a national
8 bank, and the response so indicated. There is absolutely no
9 basis whatsoever for the lawsuit against my clients here.

10 THE COURT: Well --

11 MR. BRESSLER: Nor have I heard a good reason as to
12 why this was done. Certainly --

13 THE COURT: What is the appropriate entity for Ms.
14 Jankousky to sue? Assuming that she was discriminated against,
15 who should she sue?

16 MR. BRESSLER: Well, it seems to me, Judge, having
17 filed the complaint against North Fork Bank, Capital One NA
18 having responded to that, and Capital One NA existing today, I
19 would have thought, particularly given the fact that it's
20 condition-precedent, that an action would have been brought
21 against her employer, the person who appeared and defended in
22 front of the agency, not another entity.

23 And, yes, the statute would run if Your Honor
24 determined that this was not something that fell within the
25 meaning of Rule 15 and was simply a mistake. And I've not

1 heard that there was a mistake since counsel, as well as the
2 plaintiff herself, knew very well who she worked for.

3 THE COURT: Well, I'm not really an expert on this,
4 but this is an evolving area of law of what constitutes an
5 appropriate notice. And you're not saying that you haven't
6 been notified, right?

7 MR. BRESSLER: I'm sorry, Your Honor?

8 THE COURT: You're not saying that you haven't been
9 notified or your -- not you but your client hasn't been
10 properly notified of the pendency of this EEOC matter?

11 MR. BRESSLER: Well, as to the EEOC matter, Capital
12 One NA appeared as a defendant, absolutely.

13 THE COURT: And that's the successor to North Fork
14 Bank?

15 MR. BRESSLER: That is the successor to North Fork
16 Bank.

17 THE COURT: Well, I mean, what would satisfy you? If
18 Ms. Cacace changed the caption to Capitol One, would that
19 satisfy you?

20 MR. BRESSLER: Well, no, Judge.

21 THE COURT: Why not?

22 MR. BRESSLER: Well, what would satisfy me would be a
23 dismissal. Whether the Court is going to order that or not is
24 something else, but at a very minimum, assuming arguendo, the
25 Court is not going to engage in that sort of dismissal, it

1 seems to me the wrong party is before the Court, and that has
2 to be remedied one way or another.

3 THE COURT: Well, I'm trying to figure out who is the
4 right party.

5 Ms. Cacace, can you help me on this? Because if the
6 right party -- as Mr. Bressler suggests, I guess I have to let
7 him make his application, but I think the remedy is for you to
8 right -- name the right party, whoever the right party is.

9 MS. CACACE: And that's what we would request leave to
10 do, Your Honor. If the correct party is Capital One NA as a
11 separate entity, we are happy to amend the complaint to include
12 that. I wouldn't at this initial stage want to dismiss the two
13 entities we have because the SEC documents and the New York
14 State, Division of State documents do indicate that North Fork
15 Bancorporation, Inc. is still operating.

16 And then the SEC documents filed by Capital One
17 Financial Corporation indicate that it acquired all of North
18 Fork Bancorporation in December of '06, so that's why we had
19 those parties there. But, you know, if Capital One NA is
20 willing to admit that they are the employer and they are the
21 appropriate party, we're happy to do that.

22 THE COURT: Mr. Bressler, you're looking frustrated.

23 MR. BRESSLER: Well, Judge, I would have thought based
24 upon what we have just discussed here today --

25 THE COURT: Listen, I don't mean to be -- I mean, I'm

1 not overly persnickety on these things.

2 MR. BRESSLER: No, I understand.

3 THE COURT: So I don't want to walk up one side and
4 have you make a lot of motions and have me study those motions
5 and come back down. The remedy is to change the caption.

6 MR. BRESSLER: I understand that.

7 THE COURT: I mean, is there something substantive
8 attached to this wrongly named defendant? I mean, is there a
9 likely possibility that by any stretch of the imagination I'm
10 going to dismiss because the time has run?

11 MR. BRESSLER: I'm not at all --

12 THE COURT: On a legal basis.

13 MR. BRESSLER: Well, I'm not at all certain, Judge,
14 because I haven't heard enough here today from the plaintiff as
15 to why and how this occurred to determine whether, at least in
16 my view, the Court would be satisfied under Rule 15. I'm a
17 little frustrated because having heard everything that the
18 Court has just heard, I'm not hearing that there's going to be
19 a voluntary dismissal against the two named defendants, and
20 that is definitely going to necessitate motion practice, and
21 everything that goes with it. I don't believe there's a good-
22 faith basis for continuing now that we've had this discussion
23 against those two defendants.

24 THE COURT: Ms. Jankousky was employed by -- let's go
25 through it. Help me out here. She was employed by your client

1 until when? When was she fired?

2 MR. BRESSLER: Well, my client who is not here today
3 since I did handle the EEOC matter.

4 THE COURT: Who -- who was --

5 MR. BRESSLER: She was employed by North Fork Bank,
6 and it was so admitted in the EEOC matter.

7 THE COURT: She was employed -- there's no doubt she
8 was employed by North Fork Bank, right?

9 MR. BRESSLER: That is so, Judge.

10 THE COURT: And she worked for them for how many years
11 until she was terminated?

12 MR. BRESSLER: Seven I believe, Judge.

13 MS. CACACE: From 2001 through February of 2007.

14 THE COURT: Until February of 2007?

15 MS. CACACE: March. I'm sorry, Your Honor, March of
16 2007.

17 THE COURT: March, and then she filed an EEOC
18 complaint when?

19 MS. CACACE: Let me just --

20 THE COURT: Do you know, Mr. Bressler?

21 MS. CACACE: I believe it was May of '07, Your Honor.

22 THE COURT: May of '07, and she named in the EEOC
23 complaint?

24 MR. BRESSLER: North Fork Bank.

25 THE COURT: And you appeared on behalf of North Fork

1 Bank?

2 MR. BRESSLER: Yes.

3 THE COURT: Okay.

4 MR. BRESSLER: And at that time it was a division of
5 Capital One NA, and was so named.

6 THE COURT: North Fork Bank, a division of Capitol One
7 NA?

8 MR. BRESSLER: That is correct, Judge.

9 THE COURT: Well, then this lawsuit was filed --

10 MS. CACACE: February 25th, Your Honor, of this year.

11 THE COURT: -- February 25th of '08. And your
12 complaint is that it's not in the name of North Fork, a
13 division of Capital Bank NA. It's North Fork Bank Corporation
14 doing business as North Fork Bank and Capital One Financial
15 Corp. Is that it, Mr. Bressler?

16 MR. BRESSLER: That is what happened, Judge.

17 THE COURT: Yeah. Is that your complaint? I mean, is
18 that what you're complaining about, that the header listing the
19 defendants is erroneous because there's a discrepancy between
20 the parties sued at the EEOC and to whom -- that was named in
21 the EEOC proceeding, which was North Fork, a division of
22 Capital Bank NA.

23 MR. BRESSLER: My complaint is twofold. Number one,
24 there was no association between the named defendants and this
25 particular plaintiff. Number two, the people named in the EEOC

1 are different from the people named in the complaint. And
2 number three, Judge, the complaint itself demonstrates through
3 several of the factual allegations in there that the plaintiff
4 knew and intended to name these people, having said that they
5 were Delaware corporations rather than a New York State
6 chartered bank or its successor, a national bank. So my
7 complaint is they are inappropriate defendants in their
8 entirety. And, of course, most of the allegations where I had
9 put in an answer would be met with denials.

10 THE COURT: And would you object if the defendants
11 were North Fork, a division of Capital Bank NA?

12 MR. BRESSLER: At this particular junction, Judge,
13 that appellation is no longer correct. It would be Capital One
14 NA.

15 THE COURT: Well, what are we talking about then? If
16 Ms. Cacace named North Fork, a division of Capital Bank NA,
17 wouldn't you come into court and say, Judge, they've got the
18 wrong defendant because we've undergone a restructuring, and we
19 filed these documents with the SEC and the correct title is now
20 whatever the correct title is?

21 MR. BRESSLER: Capital One NA, just the appellation a
22 division of, has been dropped. I would not make objection to
23 that. I would merely point that out to the Court and say, it
24 is Capital One NA standing alone because that's a minor name
25 change, and that would not be the proper subject I believe for

1 a motion practice.

2 THE COURT: Well, if Ms. Cacace were to do that --
3 Am I pronouncing your name correctly?

4 MS. CACACE: Yes, you are, Your Honor.

5 THE COURT: Okay. If Ms. Cacace were to do that, I
6 mean, would you say then it's too late because there's -- you
7 know, she's missed the time?

8 MR. BRESSLER: In some way, shape, or form, Judge, I
9 think I would want to preserve that argument since I've not
10 heard --

11 THE COURT: No. I'm asking you right now. What's
12 your answer?

13 MR. BRESSLER: My answer? My answer is yes, Judge, I
14 believe that that would be improper, and I believe that it's
15 time barred based on everything I've heard this morning --

16 THE COURT: This afternoon.

17 MR. BRESSLER: -- or this afternoon here.

18 THE COURT: Well, you know what the rules are in the
19 Second Circuit. I can't prevent you from making a motion,
20 although I have the distinct feeling, Mr. Bressler, with due
21 respect to your position, that it's a waste of time for me to
22 consider this motion because you're marching me up one side of
23 the hill and right down to the other. And the remedy is to
24 rename the party that was before the EEOC and then you'll come
25 in here and tell me what the correct party is. And we haven't

1 accomplished anything other than we've spun our wheels for
2 sixty or ninety days and prevented the progress of this lawsuit
3 towards its orderly conclusion, whatever that conclusion might
4 be.

5 MR. BRESSLER: I don't think that's entirely so,
6 Judge. I believe that the plaintiff retains the right to amend
7 her complaint. I don't think there's any doubt about that.
8 I've not put an answer in yet, and I believe they retain that
9 right. I think the question that the Court is putting to me,
10 without being presumptuous, is whether or not if that amendment
11 were to be made, whether I would still make an argument under
12 Federal Rule 15 as to whether or not it would be time barred.

13 And all I can say with respect to that, Judge, is that
14 having heard the comments from the bench, it is incumbent upon
15 me, if such an amendment were made, to go back to my client and
16 advise them what I think I'm hearing from the Court in that
17 regard.

18 THE COURT: I think just there's no doubt about it,
19 you can tell your client what you're hearing from me is I
20 really believe it's not an appropriate motion. I can't -- you
21 know, you have the absolute right to make the motion, and I
22 don't want to truncate that at all. It's up to you.

23 MR. BRESSLER: I understand.

24 THE COURT: I believe it's a waste of time because I
25 think what would happen here is that we'll get the names of the

1 parties aligned correctly and you'll still have a valid
2 lawsuit. We won't have lost -- I mean, the plaintiff will not
3 be out of court, so I'll give you some time to think about
4 that.

5 Ms. Cacace, are you -- do you object to amending your
6 complaint to reflect the entity that you named in the EEOC
7 matter and then have the correct name substituted? That would
8 be the name that Mr. Bressler would provide you.

9 MS. CACACE: If Mr. Bressler is representing that
10 Capital One NA is the correct --

11 THE COURT: Why wouldn't you want to sue them? You
12 want a judgment against them if you prevail.

13 MS. CACACE: Exactly. If that -- if he's going to
14 represent that that is the employer, we will absolutely amend
15 to reflect that.

16 THE COURT: Right. Right. Do you want to take some
17 time to think about that, Mr. Bressler?

18 MR. BRESSLER: Please, Judge.

19 THE COURT: Say a week's worth of time? Then if you
20 want to make the motion, then I can't stop you.

21 MR. BRESSLER: I understand, judge.

22 THE COURT: You know, you get a hold of Ms. Cacace and
23 agree upon a motion schedule. Bring it on relatively promptly
24 because I don't want to delay the matter. I don't think -- I
25 think it's extraordinarily unlikely that it would be granted.

1 I haven't seen your papers yet so it's not a foregone
2 conclusion. But if you decide to allow -- Ms. Cacace decides
3 to amend her complaint under Rule 15, then I would appreciate
4 the parties submitting a civil case management plan so we can
5 get started with this lawsuit. And when you do that, I'll fill
6 in a date for our next conference.

7 Okay. See you in a week's time, Mr. Bressler, and
8 you'll let Ms. Cacace know. And if you decide to proceed with
9 the motion, which is your right to do it, make it a prompt
10 motion.

11 MR. BRESSLER: Yes, Judge.

12 THE COURT: And so we can decide it promptly and get
13 on with the discovery. If you decide not to make the motion,
14 submit a civil case management plan reflecting the parties'
15 best wishes -- best estimates as to -- and best wishes, too.
16 The best judgment as to when discovery will be commenced and
17 concluded.

18 MR. BRESSLER: Judge, am I to understand that there is
19 going to be an amended complaint, so that I'm clear on this, or
20 not?

21 THE COURT: I think if you tell Ms. Cacace the right
22 name, she'd be happy --

23 I don't want to put words in your mouth, Ms. Cacace.

24 MS. CACACE: That's right, Your Honor.

25 THE COURT: Do I have it right?

1 MS. CACACE: Yes, absolutely.

2 THE COURT: And if you tell Mr. Bressler who the right
3 person is -- if Mr. Bressler tells you who the right person is,
4 you would be happy to amend the caption --

5 MS. CACACE: Yes.

6 THE COURT: -- to reflect the correct name of the
7 person against whom the EEOC proceeding was launched?

8 MS. CACACE: Yes. As long as it --

9 THE COURT: Is that --

10 MS. CACACE: Yes.

11 THE COURT: As long as you have that name, she will be
12 happy to substitute it.

13 MS. CACACE: And just one other thing, Your Honor. I
14 don't know if you have this in your file. I'm not sure that
15 when we filed the complaint, the exhibits were attached. So we
16 do have --

17 THE COURT: I'll tell you.

18 MS. CACACE: -- copies here with exhibits if --

19 THE COURT: I have your letter of February 27th.

20 MS. CACACE: Right. That one I believe had the -- the
21 letter.

22 THE COURT: It's seventeen pages signed by you.

23 MS. CACACE: And there are no exhibits?

24 THE COURT: No exhibits.

25 MS. CACACE: Okay. I have a copy here with the

1 exhibits, but I --

2 THE COURT: I'll give this back to you.

3 MS. CACACE: Substitute that.

4 THE COURT: This is stamped. I think I'll hold on to
5 the stamped copy, as well.

6 MS. CACACE: Okay.

7 THE COURT: Do you have an answer, Mr. --

8 MR. BRESSLER: No. Just let me note for the record
9 mine did not, either, and I've just been handed --

10 MS. CACACE: I apologize.

11 MR. BRESSLER: -- a package with exhibits attached.

12 THE COURT: Exhibit A is the retail bank incentive
13 program and B is --

14 MS. CACACE: This is a schedule of what Ms. Jankousky
15 was given concerning her bonus, both Exhibits B and C.

16 THE COURT: C is blank.

17 MS. CACACE: Blank?

18 THE COURT: There's nothing in here for C, and D is a
19 letter from --

20 MS. CACACE: From me.

21 THE COURT: -- from you to John Adam Canast
22 (phonetic).

23 MS. CACACE: Well, can I substitute again, then?

24 THE COURT: Yeah. Why don't you --

25 MS. CACACE: This one has all of these. I apologize,

1 Your Honor.

2 Do you have everything.

3 MR. BRESSLER: I have something under B that looks
4 like a schedule of 10/31/06, and I have something under C that
5 looks the same.

6 MS. CACACE: Okay.

7 MS. GOODELL: The numbers are different when you look
8 closely.

9 THE COURT: Well, my B and C are a little different.

10 MR. BRESSLER: Okay.

11 THE COURT: My B is -- shows a total incentive pool of
12 \$238,000, and Exhibit C shows a total incentive pool of 82,399.

13 MR. BRESSLER: Yes, Judge, I see that. Okay.

14 THE COURT: You're right that they're both year-to-
15 date actual through October 31st of 2006.

16 MS. CACACE: Right. Your Honor, these were two
17 different schedules that were given to Ms. Jankousky that --

18 THE COURT: Okay. All right.

19 MS. CACACE: -- with the changed bonus amount for her.

20 THE COURT: Okay. And then the final exhibit is Ms.
21 Cacace's letter to Mr. Carast -- Canast rather of February 8,
22 2007. I'll put that in the file.

23 MS. CACACE: Thank you, Your Honor.

24 THE COURT: Okay. Anything else?

25 MS. CACACE: No, Your Honor. Thank you.

1 MR. BRESSLER: No, Judge. Thank you very much.

2 THE COURT: Thank you.

3 (Proceedings concluded.)

4 *****

5 CERTIFICATION

6 I certify that the foregoing is a correct transcript
7 from the electronic sound recording of the proceedings in the
8 above-entitled matter to the best of my knowledge and ability.

9

10 Agency Typist: Ilene Watson

11

12 
13

14 _____ May 5, 2008

15 Coleen Rand, AAERT Cert No. 341
16 Certified Court Transcriptionist
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